

CG TECHNOLOGY DEVELOPMENT, LLC
et al.,

Plaintiffs,

vs.

FANDUEL, INC.,

Defendant.

ORDER

I. FACTS AND PROCEDURAL HISTORY

1 of 18

1 9,306,952. CG Tech owns the ‘818 Patent for a wireless controller (Cause of Action 1); IG Ltd.
2 owns the ‘628, ‘417, ‘924, ‘394, and ‘166 Patents for enhanced services for gaming applications
3 (Causes of Action 2, 3, 5, 6, and 7), and IG LLC owns the ‘511, ‘169, ‘058, ‘664, ‘518, and ‘952
4 Patents for location-based game configurations (Causes of Action 4, 8, 9, 10, 11, and 12).
5 Defendant has asked the Court to: (1) dismiss for failure to state a claim; (2) stay the case with
6 respect to the ‘818 Patent pending the resolution of the ‘818 Patent’s ownership in the U.S.
7 District Court for the Southern District of New York; and (3) sever the case into three cases
8 according to ownership of the Patents and category of technology.

9 **II. LEGAL STANDARDS**

10 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
11 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
12 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
13 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
14 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
15 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
16 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
17 failure to state a claim, dismissal is appropriate only when the complaint does not give the
18 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
20 sufficient to state a claim, the court will take all material allegations as true and construe them in
21 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
22 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
23 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
24 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

1 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
2 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
3 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
4 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
5 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
6 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
7 cognizable cause of action (*Conley* review), but also must allege the facts of his case so that the
8 court can determine whether the plaintiff has any basis for relief under the cause of action he has
9 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review). Put
10 differently, *Conley* only required a plaintiff to identify a major premise (a cause of action), but
11 *Twombly* and *Iqbal* require a plaintiff also to allege minor premises (facts of the plaintiff’s case)
12 such that the syllogism showing liability is logically complete and that liability necessarily, not
13 only possibly, follows (assuming the allegations are true).

14 “Generally, a district court may not consider any material beyond the pleadings in ruling
15 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
16 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
17 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
18 whose contents are alleged in a complaint and whose authenticity no party questions, but which
19 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
20 motion to dismiss” without converting the motion to dismiss into a motion for summary
21 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
22 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
23 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
24 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for

summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

III. ANALYSIS

A. Severance

The Court denies the motion to sever. Severance would not be judicially economical. The Court will have to construe whatever claim terms are disputed whether the causes of action are severed from one another or not. The claims of any single Plaintiff may be permissively joined against Defendant without limitation, *see* Fed. R. Civ. P. 18(a), and Plaintiffs may permissively join in the action because they each assert patent rights arising out of the same series of transactions or occurrences, i.e., Defendant's alleged operation of its online fantasy sports operations, *see* Fed. R. Civ. P. 20(a)(1)(A). Nor have Plaintiffs impermissibly joined multiple defendants based purely on allegations of having infringed the same patent(s). *See* 35 U.S.C. § 299. Plaintiffs have properly filed separate actions in this District against multiple defendants alleged to have infringed Plaintiffs' various patents.

B. Stay

The Court denies the motion to stay as to the '818 Patent. Plaintiffs argue that the action pending in the Southern District of New York does not concern ownership of the '818 Patent, but it in fact appears to do so. (*See* Compl. 8, ECF No. 1 in S.D.N.Y. Case No. 1:14-cv-9661, attached as Ex. B to Mot. Stay, ECF No. 45-3 (requesting as a measure of relief, *inter alia*, "assignment of [the '818 Patent] to Plaintiff [(the inventor)]"); *id.* ¶ 18 (alleging that CG Technology was required under the relevant assignment agreement to either pay certain minimum royalties or reassign the '818 Patent to the inventor)). Although there is no separate cause of action for a declaration of ownership of the '818 Patent in the New York litigation, a finding of reversion of ownership of the '818 Patent or an order requiring reassignment thereof

1 appears to be a possible outcome in that case based on the allegations the plaintiff–inventor has
2 made and the relief he has requested. The Court will therefore not deny a stay based on the
3 purported impossibility of the New York litigation’s effect on CG Tech’s ownership of the ‘818
4 Patent.

5 The Court agrees with Defendant that a stay will not prejudice CG Tech as to damages
6 because it will remain entitled to damages, if any, with interest. But the Court also finds that CG
7 Tech may be prejudiced by having to conduct duplicative *Markman* and trial proceedings as to
8 the ‘818 Patent. Although Defendant may be harmed without a stay because it will have to
9 litigate a potentially moot issue, a similar measure of harm will befall CG Tech if the Court
10 grants a stay and CG Tech must then conduct a second trial because the issue of infringement of
11 the ‘818 Patent has not been mooted by the New York litigation. Finally, a stay might simplify
12 things for the Court because it will have one fewer patent to analyze as to pretrial motions in the
13 meantime. But a stay could complicate the issues by causing the Court to have to hold additional
14 hearings and a second jury trial, which would be an extraordinary inconvenience compared to the
15 additional pretrial analysis required by the inclusion of the ‘818 Patent. On balance, the risk of
16 having to hold duplicative proceedings outweighs the risk of wasting some effort in the
17 meantime by analyzing seven patents instead of six until the relevant issue is resolved in the New
18 York litigation. The Court finds that the relevant factors do not support a stay in this case. *See*
19 *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244–45 (9th Cir. 1972) (citing *Landis v. N. Am. Co.*, 299
20 U.S. 248, 254–55 (1936)) (affirming a district court’s refusal to stay a patent infringement action
21 pending a determination of ownership in another court).

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C. Dismissal

1. The ‘628, ‘417, ‘924, ‘394, ‘169, and ‘818 Patents

The Court grants the motion to dismiss the infringement claims as to the ‘628, ‘417, ‘924, ‘394, and ‘169 Patents based on unpatentability under *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014), denies the motion under *Alice Corp.* as to the ‘818 Patent, but grants the motion as to the ‘818 Patent for failure to state a claim, with leave to amend. (*See* Order, ECF No. 36 in Case No. 2:16-cv-857). The parties have so stipulated.

2. The ‘511, ‘166, ‘058, ‘664, ‘518, and ‘952 Patents

The Court now addresses the remaining infringement claims: (1) Claim 16 of U.S. Patent No. 8,641,511; (2) Claim 39 of U.S. Patent No. 6,884,166; (3) Claim 19 of U.S. Patent No. 8,771,058; (4) Claim 17 of U.S. Patent No. 8,814,664; (5) Claim 9 of U.S. Patent No. 9,355,518; and (6) Claim 1 of U.S. Patent No. 9,306,952. Defendant does not attack the Patents under *Alice Corp.* but only attacks the First Amended Complaint (“FAC”) under *Iqbal* and *Twombly*. A defendant is liable for direct patent infringement if he “without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor” 35 U.S.C. § 271(a). “Under the ‘all elements’ rule, to find infringement, the accused device must contain ‘each limitation of the claim, either literally or by an equivalent.’” *TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1379 (Fed. Cir. 2008) (quoting *Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005) (citing *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997))).

The Court rejects Plaintiffs’ argument that the requirement of providing infringement contentions element-by-element under the Local Rules permits a more flexible application of Civil Rule 8(a) at the dismissal stage. *Iqbal* and *Twombly* unquestionably apply to claims of

1 infringement not covered by former Form 18. *See Superior Indus., LLC v. Thor Global Enters.*
2 *Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012) (citing *In re Bill of Lading Transmission &*
3 *Processing Sys. Patent Litig. (R+L Carriers, Inc. v. DriverTech LLC)*, 681 F.3d 1323, 1336
4 (Fed. Cir. 2012)) (noting that only claims of direct infringement, not claims of indirect
5 infringement, could be pled using Form 18). Although Form 18 formerly applied to claims of
6 direct infringement, obviating the *Twombly/Iqbal* pleading standard for such claims, both Form
7 18 and Rule 84 (authorizing the form) were deleted from the Civil Rules in 2015, extinguishing
8 the exception to the *Twombly/Iqbal* pleading standard for direct infringement claims. Local Rule
9 16.1-6, providing for the initial disclosure of infringement contentions before discovery, was
10 adopted no later than 2011, i.e., at a time when Rule 84 and Form 18 in conjunction permitted a
11 direct infringement plaintiff to obtain full discovery with a bare-bones pleading that would not
12 survive *Iqbal* and *Twombly*. As in other districts with similar local rules, “[b]y requiring the
13 party claiming invalidity to flesh out and support its invalidity contentions early on, the Patent
14 Local Rules fulfill[ed] the function of *Twombly* and *Iqbal*.” *Wistron Corp. v. Phillip M. Adams*
15 *& Assocs., LLC*, 2011 WL 1654466, at *11 (N.D. Cal. Apr. 28, 2011) (Chen, Mag. J.). But the
16 fact that certain aspects of Local Rule 16.1-6 may have been rendered redundant via Rule 84’s
17 deletion and the resulting application of *Iqbal* and *Twombly* to direct infringement claims, the
18 Local Rules may not harmonized with the Civil rules so as to cause an inconsistency between
19 them. *See* Fed. R. Civ. P. 83(a)(1). The Supreme Court’s interpretation of Rule 8(a) requires
20 plausible allegations as to all elements of a cause of action, and the elements of a cause of action
21 for direct infringement include each limitation of the patent claim at issue. In any case, the
22 current (2016) version of the infringement contentions rule, Local Patent Rule 1-6, requires
23 much more detailed allegations than *Iqbal* and *Twombly* do, so it is not redundant to hold
24 infringement plaintiffs to the strictures of Rule 8(a) at the pleading stage.

1 **a. The ‘511 Patent**

2 Claim 16 of the ‘511 Patent reads in full:

3 A method comprising:

4 opening, by a computer system, a gaming account for a client;

5 establishing, by the computer system, an amount of consideration in the gaming
6 account of the client, in which the money may be used to play games;

7 after opening the gaming account and establishing the amount of consideration,
8 authorizing, by the computer system, the client to access the gaming account from
9 a computing device by verifying login credentials of the client received from the
10 computing device;

11 determining, by the computer system, a set of events on which the games are
12 based;

13 presenting, by the computer system, to the client through the computing device, a
14 display indicating at least some of the set of event;

15 receiving, by the computer system, a first request from the client to enter into a
16 game based on at least one event;

17 receiving, by the computer system, a second request from another client to enter
18 into an opposite side of the game based on the at least one event;

19 matching, by the computer system, the first request and the second request in
20 response to receiving the first offer and the second offer into the game, in which
21 the game includes a game between the client and the other client;

22 forming, by the computer system, one obligation with a gaming operator to pay
23 the first client for winning the game with the client and forming one other
24 obligation with the gaming operator to pay the second client for winning the game
25 with the other client; and

26 managing, by the computer system, the amount of consideration in the wagering
27 account credits based on placement of the one or more wagers and outcomes of
28 the one or more wagers.

29 U.S. Patent No. 8,641,511 col. 13, l. 17–col. 14, l. 37. Claim 16 contains ten elements. *See id.*

30 The FAC does not contain allegations that the Accused Games contain each limitation of
31 Claim 16 of the ‘511 Patent. (*See* First Am. Compl. ¶¶ 60–68). Even assuming for the sake of

argument that the screen shots of the Accused Games incorporated into the FAC may substitute for written allegations of fact and that each screen shot presented establishes the practice of the respective elements of Claim 16 to which Plaintiffs have compared them, Plaintiffs have not addressed each element of Claim 16. The FAC addresses only the first and second, (*id.* ¶ 60), third, (*id.* ¶ 61), sixth through eighth, (*id.* ¶ 62), ninth, (*id.* ¶ 63), and tenth elements, (*id.* ¶ 64). Plaintiffs make no allegations as to the fourth or fifth elements of Claim 16, i.e., the “determining” and “presenting” elements. *See* U.S. Patent No. 8,641,511 col. 13, ll. 28–32. The Court therefore dismisses the claim of infringement of the ‘511 Patent, with leave to amend.

b. The ‘166 Patent

Claim 39 of the ‘166 Patent reads in full:

A system for establishing a wager associated with a gaming application, comprising:

a server that hosts a gaming application for a plurality of users;

a processor remotely coupled to the server that:

receives a wager offer generated by a first user, wherein the wager offer is associated with the gaming application;

presents the wager offer to a plurality of second users;

receives a wager acceptance by a second user, the wager offer and the wager acceptance combining to form a wager between the first user and the second user; and

generates a wager record in response to receiving the wager acceptance, the wager record associated with the wager between the first user and the second user and comprising a plurality of wager parameters; and

a memory coupled to the processor that stores the wager record according to a wager record identifier.

U.S. Patent No. 6,884,166 col. 23, l. 55–col. 24, l. 6. Claim 39 contains three elements, the second of which contains four sub-elements. *See id.*

1 The FAC does not contain allegations that the Accused Games contain each limitation of
 2 Claim 39 of the ‘166 Patent. (*See* First Am. Compl. ¶¶ 98–101). Even assuming for the sake of
 3 argument that the screen shots of the Accused Games incorporated into the FAC may substitute
 4 for written allegations of fact and that each screen shot presented establishes the practice of the
 5 respective elements of Claim 39 to which Plaintiffs have compared them, Plaintiffs have not
 6 addressed each element of Claim 39. The FAC addresses only the first and second elements, (*id.*
 7 ¶ 98), and the sub-elements of the second element, (*id.* ¶¶ 99–101). Plaintiffs make no
 8 allegations as to the third element of Claim 39, i.e., the “memory” element. *See* U.S. Patent No.
 9 6,884,166 col. 24, ll. 5–6. The Court therefore dismisses the claim of infringement of the ‘166
 10 Patent, with leave to amend.

11 **c. The ‘058 Patent**

12 Claim 19 of the ‘058 Patent reads in full:

13 A computer system comprising:

14 a processor operable to execute a set of instructions; and

15 a memory having stored thereon the set of instructions, in which the set of
 16 instructions, when executed by the processor, cause the computer system to
 perform a method comprising:

17 determining a first location of a mobile gaming device,

18 determining a first game configuration associated with the first location,

19 generating a first game outcome using the first game configuration,

20 determining a first payout associated with the first game outcome,

21 crediting a player account with a first amount based on the first payout,

22 determining a second location of the mobile gaming device, wherein the
 23 second location is different from the first location,

24 determining a second game configuration associated with the second
 location, wherein the second game configuration is different from the first
 game configuration,

1 generating a second game outcome using the second game configuration,
2 determining a second payout associated with the second game outcome,
3 and
4 crediting the player account with a second amount based on the second
5 payout.

6 U.S. Patent No. 8,771,058 col. 62, ll. 1–27. Claim 19 contains two elements, the second of
7 which contains ten sub-elements. *See id.*

8 The FAC does not contain allegations that the Accused Games contain each limitation of
9 Claim 19 of the ‘058 Patent. (*See* First Am. Compl. ¶¶ 124–27). Even assuming for the sake of
10 argument that the screen shots of the Accused Games incorporated into the FAC may substitute
11 for written allegations of fact and that each screen shot presented establishes the practice of the
12 respective elements of Claim 19 to which Plaintiffs have compared them, Plaintiffs have not
13 addressed each element of Claim 19. The FAC addresses only the first element, (*id.* ¶ 124), and
14 the sub-elements of the second element, (*id.* ¶¶ 124–27). Plaintiffs make no allegations as to the
15 second element of Claim 19, i.e., the “memory” element. *See* U.S. Patent No. 8,771,058 col. 62,
16 l. 3. The relevant allegation leaves a conspicuous absence (via ellipsis) of “a memory having
17 stored thereon the set of instructions,” as required to satisfy the second element of Claim 19. (*See*
18 First. Am. Compl. ¶ 124). The Court therefore dismisses the claim of infringement of the ‘058
19 Patent, with leave to amend.

20 **d. The ‘664 Patent**

21 Claim 17 of the ‘664 Patent reads in full:

22 An apparatus comprising:

23 a non-transitory medium having stored thereon a plurality of instructions that
24 when executed by a computing device, cause the computing device to:

1 determine that a mobile device associated with a first player is located in a
2 first location that is designated as a non-monetary, points only wagering
area;

3 in response to determining that the mobile device is located in the first
4 location, automatically enable points wagering and automatically disabling
monetary wagering from the mobile device while the mobile device
remains in the first location;

5 receive, from the mobile device, a challenge by the first player, in which
6 the challenge identifies an amount of points selected by the player and a
second player selected by the player against whom to place the challenge;

7 in response to receiving the challenge, identify the challenge to the second
8 player;

9 receive an acceptance of the challenge from the second player;

10 in response to receiving the acceptance, form a wager between the first
11 player and the second player based on the challenge;

12 adjust points in an account of a winning player of the challenge in
response to determining an outcome of the challenge;

13 determine mobile device is located in a second location that is designated
14 as a monetary wagering area; and

15 in response to determining that the mobile device is located in the second
16 location, automatically enable monetary wagering and automatically
disable points wagering from the mobile device while the mobile device
remains in the second location;

17 wherein the second location is geographically different from the first
18 location.

19 U.S. Patent No. 8,814,664 col. 32, ll. 1–38. Claim 17 contains one element with ten sub-
20 elements. *See id.*

21 The FAC does not contain allegations that the Accused Games contain each limitation of
22 Claim 17 of the ‘664 Patent. (*See* First Am. Compl. ¶¶ 135–40). Even assuming for the sake of
23 argument that the screen shots of the Accused Games incorporated into the FAC may substitute
24 for written allegations of fact and that each screen shot presented establishes the practice of the
respective elements of Claim 17 to which Plaintiffs have compared them, Plaintiffs have not

1 addressed each element of Claim 17. The FAC addresses only the first sub-element, (*id.* ¶ 135),
 2 the second sub-element, (*id.* ¶ 136), the third sub-element, (*id.* ¶ 137), the seventh sub-element,
 3 (*id.* ¶ 138), the eighth sub-element, (*id.* ¶ 139), and the ninth and tenth sub-elements, (*id.* ¶ 140).
 4 Plaintiffs make no allegations as to the fourth through sixth sub-elements of the single element of
 5 Claim 17, i.e., the “identify,” “receive,” and “form” sub-elements. *See* U.S. Patent No. 8,814,664
 6 col. 32, ll. 19–25. Nor do Plaintiffs make a sufficient allegation as to the single element itself.
 7 *See id.* col. 32, l. 2–3. The relevant allegation leaves a conspicuous absence (via ellipsis) of “a
 8 non-transitory medium having stored thereon a plurality of,” as required to satisfy the single
 9 element of Claim 17. (*See* First. Am. Compl. ¶ 135). The Court therefore dismisses the claim of
 10 infringement of the ‘664 Patent, with leave to amend.

11 **e. The ‘518 Patent**

12 Claim 9 of the ‘518 Patent reads in full:

13 An apparatus for supporting multiple users in electronic gaming, the apparatus
 14 comprising:

15 at least one processor; and

16 a memory electronically coupled to the at least processor and having
 17 software stored thereon that when executed by the at least one processor
 18 directs the at least one processor to:

19 establish for a user of the apparatus a user profile on a data storage
 20 device, wherein the user accesses the apparatus via an electronic
 21 device;

22 receive via a communications network from the electronic device
 23 location data of the electronic device, wherein:

24 the electronic device comprises sensor for detecting
 location,

the electronic device obtains the location data from the
 sensor, and

the electronic device communicates the location data via
 the communications network;

1 recognize an occurrence of an event;

2 update the user profile in response to the event;

3 wherein to recognize the occurrence of the event comprises
4 to determine, based on the location data, an existence of the
5 user in a particular location, and

6 wherein to update the user profile in response to the event
7 comprises to store the particular location; and

8 based on determining the existence of the user in the particular
9 location, initiate a gaming session,

10 wherein to initiate the gaming session includes to
11 communicate via the communications network information
12 to the electronic device,

13 wherein the information causes the electronic device to
14 present via a display of the electronic device a gaming
15 environment to the user or to present via the display to the
16 user a modified gaming environment that indicates to the
17 user a last gaming activity of a plurality of gaming
18 activities accessed by the user during a prior gaming
19 session,

20 a determination as to whether to display the gaming
21 environment or the modified gaming environment being
22 based on whether there is or is not a stored indication of a
23 last one of the plurality gaming activities accessed by the
24 user during the prior gaming session.

U.S. Patent No. 9,355,518 col. 27, l. 66–col. 28, l. 38. Claim 9 contains two elements, the second of which contains five sub-elements, the second of which in turn contains three sub-sub-elements, the fourth of which in turn contains two sub-sub-elements, and the fifth of which in turn contains three sub-sub-elements. *See id.*

The FAC does not contain allegations that the Accused Games contain each limitation of Claim 9 of the ‘518 Patent. (*See* First Am. Compl. ¶¶ 148–52). Even assuming for the sake of argument that the screen shots of the Accused Games incorporated into the FAC may substitute for written allegations of fact and that each screen shot presented establishes the practice of the

1 respective elements of Claim 9 to which Plaintiffs have compared them, Plaintiffs have not
 2 addressed each element of Claim 9. The FAC addresses only the second element, (*id.* ¶ 148), the
 3 first sub-element of the second element, (*id.*), the second sub-element of the second element and
 4 the three sub-sub-elements thereof, (*id.* ¶ 149), the third and fourth sub-elements of the second
 5 element and the two sub-sub-elements of the fourth sub-element, (*id.* ¶ 150), and the fifth sub-
 6 element of the second element and the three sub-sub-elements thereof, (*id.* ¶ 151–52). Plaintiffs
 7 make no allegations as to the first element of Claim 9, i.e., the “processor” element. *See* U.S.
 8 Patent No. 9,355,518 col. 28, l. 1. The relevant allegation leaves a conspicuous absence (via
 9 ellipsis) of “at least one processor,” as required to satisfy the first element of Claim 9. (*See* First.
 10 Am. Compl. ¶ 148). The Court therefore dismisses the claim of infringement of the ‘518 Patent,
 11 with leave to amend.

12 **f. The ‘952 Patent**

13 Claim 1 of the ‘952 Patent reads in full:

14 An apparatus, comprising:

15 at least one processor; and

16 a memory that stores instructions which, when executed by the at least one
 17 processor, direct the at least one processor to:

18 determine a plurality of selectable betting parameters for a wager in a
 game,

19 each selectable betting parameter comprising a game parameter
 20 that affects an outcome of a bet by a first user in the game,

21 the plurality of selectable betting parameters comprising at least a
 first selectable betting parameter and a second selectable betting
 22 parameter,

23 the game being played by at least one user using a corresponding at
 least one wireless gaming terminal associated with each of the at
 least one user, each of the at least one wireless gaming terminal
 24 having a wireless network interface operable to transmit and

1 receive gaming information, the at least one user comprising the
2 first user,

3 in which each wireless gaming terminal is in communication with
4 a location determination system that determines a location of the
5 wireless gaming terminal, each wireless gaming terminal further
6 having a user interface for interacting with a corresponding user of
7 the wireless gaming terminal to implement a game, wherein the
8 game depends on the determined location;

9 determine a plurality of different locations in a gaming area,

10 each location corresponding to at least one of the plurality of
11 selectable betting parameters,

12 the plurality of locations comprising at least a first location
13 corresponding to the first betting parameter and a second location
14 corresponding to the second betting parameter,

15 in which the first location is different from the second location,

16 in which the first selectable betting parameter is different from the
17 second selectable betting parameter such that a selection of the first
18 selectable betting parameter would cause a different result for the
19 bet than a selection of the second selectable betting parameter;

20 during the game, determine a location of at least one wireless gaming
21 terminal corresponding to each of the at least one user in the game, in
22 which the act of determining the location of the at least one wireless
23 gaming terminal comprises determining a location of the first user by
24 determining a location of a first wireless gaming terminal of the first user;

determine at least one of the plurality of selectable betting parameters
associated with the at least one user in the game based on the determined
location of the at least one user, in which the act of determining at least
one of the plurality of selectable betting parameters comprises determining
at least one of the plurality of selectable betting parameters associated
with the first user based on the determined location of the first user; and

determine the outcome of the bet based at least in part on the
determined at least one betting parameter in accordance with one or more
predetermined rules of the game.

U.S. Patent No. 9,306,952 col. 34, l. 51–col. 35, l. 48. Claim 1 contains two elements, the
second of which contains five sub-elements, the first and second of which in turn each contain
four sub-sub-elements. *See id.*

1 The FAC does not contain allegations that the Accused Games contain each limitation of
2 Claim 1 of the '952 Patent. (*See* First Am. Compl. ¶¶ 160–65). Even assuming for the sake of
3 argument that the screen shots of the Accused Games incorporated into the FAC may substitute
4 for written allegations of fact and that each screen shot presented establishes the practice of the
5 respective elements of Claim 1 to which Plaintiffs have compared them, Plaintiffs have not
6 addressed each element of Claim 1. The FAC addresses only the second element, (*id.* ¶ 160), the
7 first sub-element thereof, (*id.*), the second sub-sub-element thereof, (*id.*), the third and fourth
8 sub-sub-elements thereof, (*id.* ¶ 161), the second sub-element of the second element and the first
9 three sub-sub-elements thereof, (*id.* ¶ 162), and the third through fifth sub-elements of the second
10 element, (*id.* ¶¶ 163–65). Plaintiffs make no allegations as to the first element of Claim 1, i.e.,
11 the “processor” element, *see* U.S. Patent No. 9,306,952 col. 34, l. 52, the first sub-sub-element of
12 the first sub-element of the second element, *see id.* col. 34, ll. 58–60, or the fourth sub-sub-
13 element of the second sub-element of the second element, *see id.* col. 35, ll. 23–28. The Court
14 therefore dismisses the claim of infringement of the '952 Patent, with leave to amend.

15 **3. Willful Infringement**

16 Finally, the Court addresses the sufficiency of the allegations of willfulness under Cause
17 of Action 13. Plaintiffs allege:

18 FanDuel has been aware of at least the RE'818, '628, '511, '924, '394, '166, and
19 '169 patents since receiving notice on or about July 15, 2014. FanDuel was also
20 made aware of the '417, '058, '664, '518, and '952 patents as early as the filing of
this lawsuit. FanDuel's continued use of its infringing products constitutes willful
and blatant infringement.

21 (Am. Compl. ¶ 169; Notice Letter, July 15, 2014, ECF No. 31-1). The date of notice as to the
22 existence of asserted patents is crucial to allegations of willful infringement.

23 [In ordinary circumstances, willfulness will depend on an infringer's prelitigation
24 conduct. It is certainly true that patent infringement is an ongoing offense that
can continue after litigation has commenced. However, when a complaint is filed,
a patentee must have a good faith basis for alleging willful infringement. So a

1 willfulness claim asserted in the original complaint must necessarily be grounded
2 exclusively in the accused infringer's pre-filing conduct. By contrast, when an
3 accused infringer's post-filing conduct is reckless, a patentee can move for a
4 preliminary injunction, which generally provides an adequate remedy for
5 combating post-filing willful infringement. A patentee who does not attempt to
stop an accused infringer's activities in this manner should not be allowed to
accrue enhanced damages based solely on the infringer's post-filing conduct.
Similarly, if a patentee attempts to secure injunctive relief but fails, it is likely the
infringement did not rise to the level of recklessness.

6 *In re Seagate Technology, LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007) (en banc) (citations
7 omitted). The present lawsuit was filed on April 8, 2016. Accordingly, of the Patents that
8 survive as to invalidity, only the '818, '511, and '166 Patents have been sufficiently alleged to
9 have been willfully infringed (assuming the FAC is amended to sufficiently allege infringement
10 of those patents generally). The Court rejects the argument that Defendant was on sufficient
11 notice of its alleged infringement of related patents via Plaintiffs' indication in the letter that the
12 allegedly infringed patents were "part of a much larger portfolio." The Court dismisses the
13 willful infringement claim as to the '058, '664, '518, and '952 Patents, with leave to amend.

14 CONCLUSION

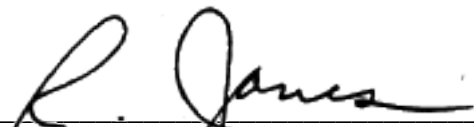
15 IT IS HEREBY ORDERED that the Motion to Sever (ECF No. 46) is DENIED.

16 IT IS FURTHER ORDERED that the Motion to Stay (ECF No. 45) is DENIED.

17 IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 44) is GRANTED,
18 with leave to amend.

19 IT IS SO ORDERED.

20 DATED: This 18th day of October, 2016.

21
22 
23 ROBERT C. JONES
24 United States District Judge